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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 404

IN THE MATTER OF
PEER MANOR BUILDING CORPORATION,
Debtor.

W. D. WITTER AND J. MARSHALL PEER,
Petitioners,

vs.

G. J. NIKOLAS, G. J. NIKOLAS & COMPANY, INC.,
AND HARRY FOOTE, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION.

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BRIEF OF RESPONDENTS IN OPPOSITION.

STATEMENT OF THE FACTS.

Certain inaccuracies and incomplete statements appear in the Statement of the Case included in petitoner's brief, as follows:

On pages 9 and 10 of petitioner's brief, it is stated that a petition was filed on July 23, 1936 by two of

the officers in the name of Peer Manor Building Corporation. The record shows that this petition was filed by the authorization of the Board of Directors (Tr. 55).

On page 10 of petitioner's brief, it is stated that "The operation and management of the apartment hotel, the only property owned by the corporation, was turned over to petitioner J. Marshall Peer, the secretary of the corporation, at the time of its dissolution." This statement is not supported by the record. That the corporation was dissolved June 18, 1934 is admitted by the petitioner Peer's answer (Tr. 11) and petitioner Witter's motion to strike (Tr. 33). The property of the corporation at the time of its dissolution was being managed by the Heitman Trust Company, First Mortgage Indenture Trustee in possession, and had been so managed since early in 1933 (Tr. 30). The indenture trustee continued this management until it was removed by the court in the bankruptcy proceeding August 1, 1936 by an order restoring the "debtor" to possession, and on August 20, 1936 a meeting of creditor and *stockholders* was called and the "debtor" was permanently continued in possession of its assets. (See Pet. Ex. No. 1, pp. 6 and 7: This exhibit, which is the record of the case on appeal which was filed against the corporate entity, is not included in the printed transcript, but was certified as an exhibit to this court by the Circuit Court of Appeals). More than 75 per cent of the stockholders actively joined in the plan that was confirmed by the District Court December 2, 1936 (Pet. Ex. No. 1, page 8).

That all the shareholders joined in a trust agreement dated April 27, 1937 was alleged in the request for admissions (Pet. Ex. No. 1 page 37) and was admitted by petitioner Witter (Pet. Ex. No. 1, page 43,

Par. 8). This agreement provided for the management by the company and the deposit of notes and rents after operation with the indenture trustee who was to pay costs, taxes and interest and to operate a sinking fund for the reirtement of bonds (Pet. Ex. 5, Tr. 32, 39). This trust agreement was approved as a part of the plan (Pet. Ex. No. 1, page 13).

The record does not support the statement on page 10 of petitioner's brief that there was never any shareholders' meetings after 1934. The court record shows a meeting of shareholders called for August 20, 1936, (Pet. Ex. No. 1, pages 6 and 7).

The record does not support the statement on page 10 of petitioner's brief that a final reorganization was confirmed on the petition filed December 5, 1941.

The statement on page 12 of petitioner's brief that the decision of the Circuit Court of Appeals in this case "nullifying the effect of their own decision and the denial of certiorari of this court," is not correct, but this is perhaps a question of law to be dealt with under argument.

ARGUMENT.

I.

The decision on the former appeal was not a bar to this action.

The District Court based its decision denying approval of the petition filed in this case on the theory that the matter was *res adjudicata* by the decision of the Circuit Court of Appeals in the former case. The court said that he was including the finding that there was

not a corporation which the Bankruptcy Act gives jurisdiction of to the District Court "so you can have both questions up" (Tr. 63). The record shows that the counsel was offering to furnish the court with authority on the latter question to the contrary, but that the court refused to consider such authority (Tr. 63).

The Circuit Court of Appeals correctly reversed both findings of the District Court.

To have *res adjudicata* or estoppel by judgment there must be present at least two indispensable elements: 1. Identity of parties. 2. Identity of issues.

> "Where the former adjudication is relied upon as an absolute bar, there must be as between the two actions, identity of parties, of subject matter and cause of action."
>
> *Leopold, et al.* v. *City of Chicago,* 150 Ill. 568, 573.

See also *People* v. *Locklin,* 273 Ill. 106, 108.

In *Troxell* v. *Delaware L.&W.R. Co.,* 227 U.S. 434, 33 S. Ct. 274, 277, this court said:

> "Furthermore it is well settled that to work an estoppel by judgment there must have been identity of parties in the two actions."

That case holds that where a suit is on the same cause of action estoppel by judgment arises in respect to every matter offered or received in evidence or which might have been offered to sustain or defeat the claim in controversy, but where the second suit is upon a different claim or demand the prior judgment bars as an estoppel only as to matters in issue or points controverted and actually determined in the original suit.

In that case this court held that a suit by a widow on behalf of herself and children for damages for the

death of her husband was not a bar to a suit by her under Federal Employers Liability Act, as administratrix of her husband's estate. The widow in her individual capacity and the same woman as administratix did not satisfy the requirements of identity of parties.

In its first decision the Circuit Court of Appeals had before it a petition against an alleged Illinois corporation (Pet. Ex. No. 1, page 17). Service was sought against a corporate entity thought to exist under Illinois law. That was the only party respondent to the petition filed in that case. If the corporation was extinct for all purposes then there was no entity to proceed against and no process had been sought issued against or served on an existing legal person. The alleged person (*i.e.* "an Illinois corporation") sought to be served was not *in esse,* hence the jurisdiction of the District Court would fail because there was no party before the court with whom issue could be joined, and upon whom the jurisdiction conferred by the bankruptcy act could operate. There was no corporate entity for the court to reorganize; and *that is precisely what the Court of Appeals said,* 134 Fed. (2d) 840.

> *"Since the court had no other party before it* and could not subpoena a defunct corporation, it was without jurisdiction to proceed." (Italics ours.)

Petitioners say that we have the same parties petitioner here as in the previous case. Granted that we have some of them, this is not enough. The fact that John Jones in *Jones* v. *Smith* is the identical John Jones who is now suing William Robinson in another case would not afford grounds for estoppel by judgment in the former suit to be pleaded in the latter, even if the issues and subject matter are the same. The fact that

there was a judgment for the defendant in a case where Jones sued William Smith as the maker of a note would be no bar to an issue on the same note against Henry Smith who did make the note.

Identity of parties means identity of parties on both sides of an issue, not merely identity of one party. It is clear that the Court of Appeals held that there was no party respondent before the District Court in the former case; since this was true there could be no identity of parties in this suit for there is no party in the first suit to be identified.

The second element necessary to *res adjudicata* is also lacking in this case, identity of issues. The issues involved in the prior case were, (1) Whether there was a pending case within the meaning of Section 127 of Chapter X of the Bankruptcy Act, in which suit a creditor's petition could be filed under that section, (2) Whether a creditor's petition filed under Section 127 of Chapter X of the Bankruptcy Act would lie against an Illinois corporation whose charter had been revoked for more than two years. The opinion of the Court of Appeals in the former case answered both questions in the negative. There was, however, no unanimity between the three judges except as to result and the later opinion indicates that that unanimity was based on the question of whether there was a pending case. The answer to that question in the negative completely disposes of the case and nothing further was necessary to require a mandate for dismissal. In any event the court did not discuss, and did not have before it on the pleadings, and did not pass on the question of whether the business herein involved was being conducted as an unincorporated company or association

which could be subjected by an original creditor's petition to the jurisdiction of the bankruptcy court under the definition of a corporation as provided by the bankruptcy act for its own purpose, which is the only issue in the case at bar; nor could have this issue been properly presented on the pleadings because the court had not before it any pleadings filed and had no process issued against or even purporting to be filed or issued against an unincorporated company or association. Ergo it follows, that the issues involved in this case could be neither properly presented nor properly determined.

It is true we did present on motion for rehearing to the Appellate Court and with our petition for certiorari in this court briefs wherein we sought to raise those issues, but both courts ignored those portions of our briefs, and not one word was said by the court's opinion on the subject. We have upon reflection concluded that the court was justified in disregarding these issues for the reason that there was no record before the court on which the court could determine the issues sought to be raised. It therefore follows that the proceeding is lacking in the second indispensable element of *res adjudicata,* that is identity of issues. There is no conflict whatsoever between the decision of the Appellate Court in the former case and its decision in this case. None of the cases cited by petitioners supports their contention, and none of those decisions in any way conflct with what we have hereinabove asserted to be the rules of law applicable. The sole action of this court in the former case was to deny the petition for certiorari. It is well established that a denial of a petition for certiroari is not an adjudication on the merits on any issue in the case.

II.

Findings of fact by the District Court sitting in bankruptcy are not binding on a reviewing tribunal.

The Circuit Court of Appeals derives its jurisdiction in a bankruptcy proceeding and in controversies arising in bankruptcy from Sections 24 and 25 of the Bankruptcy Act itself, Sections 47 and 48, Title 11, U.S.C.A., and that statute describes the scope of the jurisdiction of the Circuit Court of Appeals "to review, affirm, revise, or reverse, both in matters of law and in *matters of fact.*" This statute takes bankruptcy proceedings and controversies out of the general rule referred to as Rule 52 in petitioner's brief herein. The statutes makes it clear that jurisdiction is conferred upon the Circuit Court of Appeals to review, reverse and revise judgments of the District Court in questions of fact, as well as in questions of law.

III.

The question of whether an unincorporated company constitutes an entity or whether it constitutes a partnership whose members are jointly and severally liable under the Illinois law is not determinative of the jurisdiction of a bankruptcy court.

The Constitution of the United States, Article I, Section 8, confers on the Congress the power "To establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States." This provision of the Constitution is the source of the authority of the Congress to enact all bankruptcy legislation. The grant of power is

limited to the enactment of "uniform" laws throughout the United States. Congress exercising this power enacted Section 106 of Chapter X (Title 11, Section 506, U.S.C.A.) which so far as here pertinent reads: " 'Corporation' shall mean a corporation, as defined in this Title, which could be adjudged a bankrupt under this Title."

The definition thus incorporated in Chapter X by this reference is found in Chapter 1 of the same title Section 1 (8); Title 11, Section 1 (8), U.S.C.A.

> " 'Corporation' shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument."

It is obvious the Congress intended by this statute to extend the scope of bankruptcy jurisdiction far beyond that of legal corporate entities operating under charters. Petitioner's contention is that the law of Illinois does not recognize unincorporated companies as legal entities but by legislative fiat makes each of the participants therein liable individually as partners.

Whether this be true or not is a matter of no import. The Congress by enacting the statute quoted above set up its own definition of a corporation for the purpose of bankruptcy. That definition was established pursuant to a constitutional grant of power. It, therefore, is the supreme law of the land, and if there were a conflict

between this definition and that of the statutes of the State of Illinois the state statutes would give way to the bankruptcy statutes. However, there is no conflict involved. The bankruptcy statute does not purport to define a corporation for the purpose of operation of the state laws, nor does the state statute, cited by petitioners, purport to define a corporation for the purpose of bankruptcy jurisdiction. The conflict is imagined and not real, and the cases cited under petitioner's heading III are therefore not applicable to any issue herein involved, and the same thing is true of the citations appearing in Subdivision (c) of IV in petitioner's brief, pages 29-30.

IV.

The question of the status of the entity created by a state charter more than two years after dissolution in Illinois is not an issue which presents itelf in this case.

On pages 25 to 30 of petitioner's brief, attention is paid to the question of what is the status of the corporation created under Illinois law more than two years after its dissolution by a court in Illinois and discussion is had as to whether it is a *de facto* corporation. It was contended in the prior case that the corporation was not nonexistent for all purposes, and that where there were creditors an involuntary petition in bankruptcy would lie against such corporation even though the period of its capacity to sue or to be sued under the state statute had expired. The majority opinion of the Circuit Court of Apepals in the prior case said that such corporation was dead for all purposes. It based that conclusion on the case of *4136 Wilcox Building Corporation,* 302 U. S. 120, 58 Sup. Ct. 125. Whether this

opinion correctly expressed the law or not, the *Wilcox* case does not furnish the authority because this court in the *Wilcox* case expressly refrained from ruling on the question of whether an involuntary petition could lie against such corporation in a bankruptcy court, and it is not even clear that the ruling just referred to was even the majority view of the Circuit Court of Appeals, inasmuch as the concurring judge concurred in the result only. However, this issue is not involved in the case at bar.

There is no question here as to the continuity of an entity deriving its existence from the state after its dissolution by the state of its creation. This case rests upon what the parties did after the dissolution and their conduct of the business after the dissolution. Petitioners are mistaken in their contention that the Circuit Court of Appeals in this matter resurrected a corporation after its demise or attempted to do so. Whatever may have happened with respect to the old corporation, the acts of the parties manifested that there was being operated an unincorporated company. It may well be, as petitioners contend, that where stockholders of a company continue to conduct a business after a corporate existence has been terminated by the state, that such conduct is contrary to the state law, and it also may well be that by statutory provision the participants are personally liable. The legal effect in that respect does not alter the factual situation that a group of people were jointly conducting a business for their common purpose, and that this group had and was using property, engaging in transactions, incurring and discharging indebtedness, acknowledging obligations under the first mortgage, accepting same and paying interest thereon, and as such would and did constitute

an unincorporated company within the meaning of the Bankruptcy Act, whether or not there was an entity which could be sued in the courts of Illinois, which courts were without the aid of the statutory definition of a corporation for the purposes of bankruptcy. The petition in this case is against the Peer Manor Building Corporation, an unincorporated company. The petition described the individuals and corporations participating in this enterprise and thereby constituting an unincorporated company. Whether or not it named all the persons that participated, or named more persons than participated, has not been joined as an issue below, and is therefore not properly before this court.

V.

The decision in this case is not in conflict with the decision of the first circuit construing Sec. 1(8) of the Bankruptcy Act.

Under their topic V, pages 32 to 37 of petitioner's brief, they seek to show conflict with the case of *Pope & Cottle Co.* v. *Fairbanks Realty Trust,* 124 Fed. (2d) 132. They apparently base their argument on the definition given in that case, 124 Fed. (2d), 134, where it is said that generally organizations held subject to involuntary bankruptcy in this category have been "unincorporated associations of persons joining together at least in part for some common business or commercial purpose and conducting their affairs somewhat after the pattern of corporations." From this petitioners conclude that there is no corporation within the meaning of the Act here, because they say that after the corporation was dissolved "the former shareholders in no way united or associated themselves with Peer to form a group or

an entity." (Pet. Br., p. 30) Petitioners arrive at their conclusion of law by a misstatement of the facts. The parties did associate themselves together to form a group or entity after the dissolution. We contend that it was not required that such an association must be fully and completely expressed in writing, but that it is enough if the acts of the parties showed such an association, and further the parties did conduct their affairs somewhat *after the pattern of corporations,* and hence come squarely within the general definition given by the first Circuit Court of Appeals in the *Pope* case, quoted by petitioners. The case is distinguishable on the facts as found by the Circuit Court of Appeals in this case. We have heretofore pointed out the fallacy of petitioner's contention reiterated on page 31 that the finding of the District Court was conclusive on the Court of Appeals and the argument need not here be repeated. We shall demonstrate under our next topic heading that the parties herein involved did bring themselves within the definition laid down by the first Circuit Court of Appeals in the *Pope* case cited by petitioners.

VI.

The Peer Manor Building Corporation is an unincorporated company which constitutes a corporation within the meaning of the Bankruptcy Act, and hence is subject to the jurisdiction of the bankruptcy court on a proper petition under the provisions of Chapter X of that act.

We have hereinabove quoted Section 106, Chapter X, Title 11, Section 50, U.S.C.A., and Chapter 1, Section 1 (8), Title 11, Section 1 (8), U.S.C.A., which sets up the definition of a corporation for purposes of bank-

ruptcy reorganization. The question here is whether there is disclosed by the record such unincorporated company or association as comes within the purview of that statute. For this purpose we are accepting the opinion of the Circuit Court of Appeals in the prior case, wherein it was stated that two years from the date that the corporate charter of the Peer Manor Building Corporation was revoked (June 18, 1934) the corporate entity ceased to exist for all purposes under the law of Illinois.

A corporation whether *de facto* or *de jure* can only act through natural persons. The corporation when a legal entity chartered by the State of Illinois had acted through its agents, principally J. Marshall Peer, who was at first President and later Secretary and Director (Tr. 29-30). It did not cease to operate, it did not liquidate its assets, it did not do any other act recognizing the revocation of the charter at the time of the court's decree dissolving it. Instead, the business continued in the same manner, under the same name and by direction of the same agent (Tr. 29-63).

At the time the two years allowed by Illinois law for the winding up of the corporate affairs expired the property of the corporation was in the hands of the Indenture Trustee for default on the first mortgage (Tr. 30). The possession of the property was regained by the Federal court proceedings instituted by McHugh and Peer petitioning in the name of Peer Manor Building Corporation, representing it to be a corporation, and representing that the petition was authorized by a corporate Board of Directors (Tr. 55) (See Pet. Ex. 1, pp. 2-4). The court ordered the debtor restored to possession. Peer came forward and acted in the name of

a corporate debtor in possession (Tr. 30) (Pet. Ex. 1, p. 5). The same Peer who now challenges these proceedings as one of the petitioners herein then robed himself in a corporate cloak and styled himself corporate officer and corporate agent, exercised powers of a corporation, in corporate name, form and style. Whether the court had jurisdiction or not, and whether there was a legal entity or not, Peer and McHugh associated themselves together, acted in concert, exercised the powers of a corporation, acted in the corporate name and conducted affairs after the pattern of corporation. They did this in initiating the proceedings as shown by the petition (Pet. Ex. 1, pp. 2-4) on July 23, 1936, and McHugh then swore to the petition which stated that the Directors had met and authorized its filing. On November 28, 1936, McHugh and Peer acted together in association in the corporate name, and by corporate pattern when they executed an extension agreement as corporate officers, as well as interest coupons likewise executed (Pet. Ex. 11, Tr. 53). They again acted together in a corporate pattern on April 27, 1937 when they executed and attested a trust agreement in the corporate name and style (Pet. Ex. 5, Tr. 32-39). They acted in the same manner again on August 6, 1940 when they executed a chattel mortgage note and a chattel mortgage (Tr. 45-51). They on August 10, 1940 appeared before a Notary Public and acknowledged a chattel mortgage as corporate officers. It would seem that more ample evidence would not be necessary to sustain the finding of the Court of Appeals that there was being conducted an unincorporated company, at least by Peer and McHugh, but there is other evidence in the record. It is not a sufficient answer to say that several of the documents were executed pursuant to

order of the District Court, and in consummation of a plan approved by it. The petition filed in the court was not executed by any order of the court, nor was the chattel mortgage and the chattel mortgage note, but in any event the orders of the District Court, which approved the execution of some of these documents were all entered, and the plan itself was approved in a proceeding in which this same unincorporated company, acting through McHugh and Peer, were the moving parties. These court orders did not impose tasks on the debtor or its officers. The orders merely granted their requests.

This unincorporated company hired counsel to represent it and counsel acted. We find Carey, the lawyer, in August, 1937 and again in December, 1937 acting not in the name of Peer as a stockholder, or co-owner, as he now contends, but acting in the name of Peer Manor Building Corporation (Pet. Exs. 2, 3, Tr. 59-60). This attorney appeared in the name of the company and acted for it in 1936 and up until the controversy developed on the expiration of the extension agreement (Tr. 61). The same attorneys appeared and filed a petition in the court in the name of Peer Manor Building Corporation December 27, 1941 (Pet. Ex. 1, pp. 32-33) and again on December 29, 1941 (Pet. Ex 1, pp. 33-34).

The company made no change in its method of operating up to the time of the filing of this petition. It is true that on several occasions receivers and trustees intervened by direction of the courts, but they did not change the company structure. The conduct of this business as a company was lastly interrupted by the receiver appointed in December, 1941, and then the trustee in 1942 who continued in possession of the property up to the filing of the petition herein. True the trustee has

been held to be there on orders of a court without jurisdiction. This might be demonstrative of this status but would have no bearing on the character of the business as an unincorporated company.

Mr. Daniel J. McCarthy, attorney, appeared in the District Court for this company on June 13, 1942 (Pet. Ex. 1, p. 47). Peer continuously acted in the same manner in conducting the affairs of the unincorporated company as he had acted in conducting the affairs of the incorporated company up to the time the court assumed jurisdiction in December, 1941. He said he did not find out that the charter was revoked until the summer of 1941 (Tr. 55). He said that so far as he knew no one in connection with the company knew that the charter was revoked (Tr. 30). When Peer did learn about the revocation of the charter he continued to operate the business the same way (Tr. 54-55). When asked to identify his signature to the petition filed in the District Court, he said "What other name should I sign? It was still Peer Manor Building Corporation, not incorporated." (Tr. 55.) The only fair inference from this is, that it was considered by the parties who were responsible for the transactions as an unincorporated company.

The foregoing, we believe, establishes clearly that Peer and McHugh acted together in association in the manner and form of a corporation in conducting the business over a period of years lapsing between the revocation of the old charter and the institution of this proceeding. Whether or not we have included in our petition in this case parties that were not in the association is a matter that would be determined on hearing in the District Court, and does not go to the jurisdiction of the court to hear the cause so long as we have

established that some of the parties charged did act in concert and did constitute an unincorporated company. However, the concerted action is not limited to Peer and McHugh. On April 27, 1937 a trust agreement was entered into in the name of this company (Tr. 32-39). This agreement provided for the delivery of all the stock of the Peer Manor Building Corporation to the trustee thereunder; it provided for the voting of the stock by the stockholders, except in case of default; for the election of Directors; it imposed restrictions on the Directors and stockholders against changing the capital structure or encumbering or disposing of substantially all the assets (Tr. 36-37); it provided for the management by the trustee of such affairs as paying expenses of litigation, taxes, interest and administering a sinking fund to retire the indebtedness (Tr. 37); it provided that it was to continue in effect until all first mortgage bonds should be retired and interest paid, and the trust deed released of record (Tr. 39). Petitioner's Exhibit 1, page 15 shows that the holders of 703 shares of the capital stock out of 903 shares issued had deposited their stock under this agreement up to August 27, 1937, and, that among those who deposited, there appeared to have been J. Marshall Peer depositing 186 shares and James McHugh depositing 172 shares. It was alleged in a request for admissions in that case that all of the stockholders had deposited prior to the filing of that request, June 13, 1942 (Pet. Ex. 1, pp. 35, 37). That allegation was admitted by petitioner Witter in his answer thereto (Pet. Ex. 1, p. 43). More than 75 per cent of the stockholders actively joined in the plan that was confirmed in the District Court December 2, 1936 (Pet. Ex. 1, p. 8). These depositors are the parties who are named as constituting the persons asso-

ciated together in the unincorporated company. The Heitman Trust Company, trustee, functioned under this trust agreement until the District Court assumed jurisdiction on the petition filed December 5, 1941, and received the rents as therein provided monthly (Pet. Exs. 2-3, Tr. 59-60, Pet. Exs. 6, 7, 8, Tr. 41-45, testimony of Peer, Tr. 30-31). The trust agreement by its terms provided that adherence thereto was to be evidence by deposit of the shares of the old corporation. All of these transactions showed that the parties, not only Peer and McHugh, but the other shareholders who deposited their shares had adhered to the trust agreement, ratified the petition that had been filed in the bankruptcy court by Peer and McHugh in the name of the corporation, and adhered to the plan. All these acts manifested their association, and if its evidence in writing in a single document was necessary then the trust agreement furnished that evidence.

We suggest that these transactions were voluntary transactions, since the authorizations given by the court decree, whether with or without jurisdiction, were entered at the suit of these parties, and they could not have any different construction placed on their voluntary act because the court approved them, whether with or without jurisdiction.

We further submit that since the charter had been revoked the acts of these parties resulted in an unincorporated company, and the execution of the trust agreement by Peer and McHugh, and the adherence to it by the other stockholders by their acceptance of the plan, and by the deposit of their stock under the trust agreement constitute acts of association on the part of these stockholders for the purpose of carrying on this business in the manner and in the form it was carried

on, whether the court had any jurisdiction to approve it or not. The failure of the jurisdiction would strip the transaction of judicial sanction, but would not undo the acts of the parties, nor would it change the character of those acts.

The language of the statutory definition has been interpreted in a number of cases. A leading case cited by many of the courts subsequently as authority is entitled *In re Order of Sparta,* 242 Fed. 235, C.C.A. 3. That court reviewing a bankruptcy decision construed the words "any unincorporated company." The Order of Sparta was an unincorporated fraternal association. The meaning of the words "any unincorporated company" in the bankruptcy act was directly in issue. The court pointed out that the Order of Sparta had no capital stock, that its members were not individually liable to pay either the benefit certificates or its other debts, these being payable out of the treasury.

In this case, except for the original guarantee of J. Marshall Peer, the stockholders of the old company who became participants in the unincorporated company, were not liable for the indebtedness herein involved individually. The mortgage was payable out of the property secured thereby. The Third Circuit Court of Appeals in the Sparta case said in part on page 238:

> "Whatever may be the full scope of the word 'Company', it does include at least any unincorporated association or group of individuals whose object and purpose are either wholly or chiefly of the same kind as the object and purpose of a moneyed business, or commercial corporation. A corporation is also a group of individuals, and the fact that one group has a charter, while another group with an identical object has none, hardly furnishes a sufficient reason for exempting the latter from the scope of the act."

We suggest that while stockhodlers of the corporation after the revocation of its charter continue to act for years in precisely the same manner, doing business in precisely the same way and in the same name, it would be indeed a strange construction that would consider it anything other than a business company without a charter.

The court in the Sparta case continued on page 239, as follows:

> "Two minor objections may be briefly noticed. The first is that the order is not a legal entity, and cannot be sued *qua order*. To this it is enough to answer that, as Congress has permitted a suit in bankruptcy to be brought against such a company, no reason is apparent why the proceeding should not bring the company into court under its own name—of course with notice to the proper officials."

The other question referred to is not herein involved. Every element used by the court as a test to determine the existence of a corporation under the statute in that case is present here.

The same language was construed by the Second Circuit Court of Appeals in the case entitled *In re Tidewater Coal Exchange,* 280 Fed. 638. In that case the court quotes with approval the decision of the Third Circuit Court of Appeals in the case *In re Order of Sparta,* which we have quoted above and says on pages 643, 644:

> "A company is defined in the Century Dictionary as 'a number of persons united for performing or carrying on anything jointly.' If such a number of persons are united for carrying on any kind of business enterprise jointly, and are not incorporated, and do not constitute a partnership, they are an 'unincorporated company' within the true intent,

> and meaning of the acts of Congress relating to bankruptcy. * * * It is not a 'corporation,' not having been incorporated at the time involved. It is not a partnership, there being no agreement to divide the profit and bear the loss. It is not a joint-stock company, for there is no stock. It is simply an unincorporated company or association engaged in the prosecution of a business enterprise, as distinguished from one which is charitable, or religious, or educational, or social. * * * It is sufficient that the Exchange is an association of individuals in pursuit of a common business object, under a control agreed to by all its members, and capable of having debtors and creditors, and which is neither a corporation, nor a partnership, nor a joint-stock company. It is 'an unincorporated company' within the meaning of the act, and as such can be adjudicated a bankrupt."

The Peer Manor Building Corporation as it operated after the expiration of its charter acting precisely as a corporation and in the name and style of a corporation, could not be said to be less an unincorporated company than the Tidewater Coal Exchange. There is another parallel in that case in that the members of the Exchange included corporations and partnerships, as well as individuals.

The court said on page 641:

> "The membership of the Exchange included, not only individuals, but corporations and partnerships as well."

Petitioners here complain that we have charged that the unincorporated company was made up of individuals and corporations. That was true in the Tidewater Exchange case, also as we have indicated; that did not prevent the court of bankruptcy from having jurisdic-

tion over the unincorporated company itself. Certainly this record shows that McHugh and Peer were united for performing and carrying on a business enterprise jointly, and the Court of Appeals said it was not incorporated, it contained none of the elements of a partnership, and the deposit of stock under the trust agreement, and the approval of the plan by the participants who were the former stockholders definitely shows their association in that business.

In the case entitled *In re Seaboard Fire Underwriters,* 137 Fed. 987, the District Court for the Southern District of New York held an unincorporated association of fire underwriters to be an unincorporated company, within the meaning of the act, and as such subject to be adjudicated a bankrupt, although, if it had been incorporated, it could not have been proceeded against, because corporations carrying on the business of insurance were expressly excepted from the provisions of the act.

In the case of *Gallagher* v. *Hannigan,* 5 Fed. (2d) 171, the First Circuit Court of Appeals had before it the Old Colony Foreign Exchange Company to determine its status within the meaning of the bankruptcy statute. In that case three parties had executed a trust agreement ostensibly for the purpose of carrying on different lines of business, including the purchase of foreign merchandise and exchange, and provided that title to all property acquired should be in them or their trustees or successors; provided that the sole duties of the trustees would be to hold title to the property; that directors should be elected who would have exclusive management of the business; that there should be no personal liability on the part of the trustees or the Board of Directors or the certificate holders; that the prop-

erty of the trust only be liable. This instrument was filed with the Commissioner of Corporation for Massachusetts. The company never conducted any business of the kind described in its written instrument; no certificates of ownership of units were ever issued to any parties except the three trustees; no directors were ever elected and no records of meetings were ever kept; no investment was ever made by the company and no purchases outside of office furniture were ever made. The company had done no business except to borrow money on its notes and debentures, to make payments on notes and pay commissions and attorney fees.

The court said on page 174:

> "While in fact this association was a mere sham and pretense, intended to gain the confidence of the public in order to defraud it, yet, so far as it had any status and could perform any acts, it could only do so through them, and their acts were its acts. * * * We concur with the two learned District Judges in rejecting this proposition and its results, and hold that the bankrupt was an 'unincorporated company,' within the meaning of section 4b of the Bankruptcy Act. * * *"

The proposal rejected was the contention of the defendants that the concern was a partnership.

The court continued in the opinion:

> "Undoubtedly, such associations, when fully organized as the declaration of trust in this case contemplated, are held by the Massachusetts courts to be, for certain narrowly limited purposes, partnerships. But it does not at all follow that under federal law they cannot be properly adjudicated bankrupt as unincorporated companies."

This case not only sustains our contention that this

company is an unincorporated company but answers the contention of the petitioners herein that it could not be adjudicated because of being a partnership under Illinois law. The partnership claimed is certainly a partnership for narrowly limited purposes purely by statute as was the Old Colony Foreign Exchange Company in the case we have just referred to under the Massachusetts statute. That case holds a company which exists wholly as a sham and pretense amenable to the bankruptcy statute under its definition of a corporation. It is not necessary to go that far in this case; this company actually conducted business and operated over a times as receivers or trustees, appointed by the courts, intervened and operated the property for whomever might be in interest.

In the case of *In re Poland Union,* 77 Fed. (2d) 855, the Second Circuit Court of Appeals reiterated the doctrine laid down in the *Tidewater Exchange* case, which we have cited above and there held that the Poland Union came within the definition of a corporation under the provisions of Section 77B of the Bankruptcy Act, which preceded Chapter X of the present act.

Other cases supporting this same doctrine are, *In re Booth's Drug Store,* 19 Fed. Sup. 95, D.C. W.Va.; *In re Minnesota Insurance Underwriters,* 36 Fed. (2d) 371 (D.C.); *Brooklyn Trust Company* v. *Commissioner of Internal Revenue,* 80 Fed. (2d) 865 (C.C.A. 2).

The phrase in the statute, to which we have referred, is "unincorporated companies and associations." This phrase appeared in the amendment to the Bankruptcy Act in 1926. The Revenue Act of 1926 also made "uninperiod of seven years without a charter, except for such corporated associations" liable as corporations for in-

come taxes. This and other courts have interpreted the meaning of "associations" as used in the Revenue Act by the same Congress in the same year that it was included in the Bankruptcy Act. We believe it to be a fair inference that the Congress intended to have the same meaning apply in both cases.

In the case entitled *Morrissey* v. *Commissioner of Internal Revenue,* 296 U.S. 344, 56 Sup. Ct. 289, this court said on page 295:

> "The inclusion of associations with corporations implies resemblance; but it is resemblance and not identity * * * As we have seen, the classification cannot be said to require organization under a statute, or with statutory privileges."

This court maintained the same doctrine in the cases of *Helvering* v. *Coleman-Gilbert Associates,* 296 U.S. 369; 56 Sup. Ct. 285, and *Helvering* v. *Combs, et al.,* 296 U.S. 365; 56 S. Ct. 287.

In other words this court has construed the provisions of the revenue statute, including for the purposes thereof "associations" in the term "corporations" to require something less, not something greater than an organization under the statute with statutory privileges.

In the case of *Crocker* v. *Commissioner of Internal Revenue,* 84 Fed. (2d) 64, C.C.A. 7, there was before the court a corporation that had been dissolved by the State of Illinois for some ten or twelve years before the suit was brought. The company had been incorporated for a stated period and its charter would have expired in 1912, even if it had not already been dissolved theretofore, but the business was continued under the corporate name after the charter was revoked but without

any formal corporate organization being maintained. The issue before the court was whether this business was taxable as a corporation under the Revenue Act of 1926 by reason of the fact that the Act included under the definition of corporations for tax purposes the term "associations," (Section 2-(a) (2) of the Revenue Act of 1926, C. 27, 44 Stat. 9-131). The case does not state the date of the forfeiture of the charter for failure to file statutory reports; it does state that the company was incorporated in 1892 for 20 years, and the suit was under the Revenue Act of 1926, and the court says on page 65:

> "After the forfeiture and the expiration of the charter by its terms, the utility business of the corporation was conducted in the corporate name by petitioner John Crocker, and he and his associates treated the assets and franchise as owned by them as tenants in common."

The court said further on the same page:

> "Petitioners contend that the company was not a corporation or an association taxable as a corporation, * * * Obviously, at least upon expiration of its charter, the company ceased to be a corporation *de jure,* and the state might have objected to its further exercise of corporate authority."

The court after analyzing the regulations continues and cites from Regulation 69 of the Treasury Department, the following:

> " 'A corporation which has ceased to exist in contemplation of law but continues its business in quasi-corporate form is an association or corporation within the meaning of section 2.' "

The court held that for the purpose of the revenue

statute this company constituted an association taxable as a "corporation."

We suggest that in the absence of any indication by the Congress to the contrary that where it uses the same term as being embraced in a statutory definition of corporations in two statutes enacted in the same year by the same Congress that it cannot be said to have meant one thing in one of those statutes and to have meant something different in the other.

Whatever may have been the ultimate right of the stockholders after the dissolution of the corporation the fact remains that there was at the time of the dissolution real property held by the corporation; that there were outstanding bonds which were secured by trust deed to this property; that the two-year period provided by the Illinois statute expired without these bond creditors having been paid; that the enterprise was kept intact; that there was no distribution of any assets to individuals as stockholders; that the business did continue to be operated as a unit and that it was operated by some of the stockholders who had been corporate officers, and that operation was concurred in and approved by other stockholders; there was here an association to reorganize.

It is a demonstration of the kind of thing which motivated the Congress to include the broad term in its definition of corporation. It was the legislative purpose to afford a method of reorganization of affairs of a company for the benefit of creditors in a situation of this kind without relegating those creditors to a multiplicity of actions in the state court to determine title to funds, necessitating the including of a large number of persons as parties in a proceeding. Such would be the result if we were to accept the conclusions of the

petitioners as to the status of this enterprise, that is, a property operated by one tenant in common and owned by a large number of tenants in common.

Conclusion.

We conclude:

1. That the issues in this case were not adjudicated by the decision of the Circuit Court of Appeals in the first case (a) because there is not here the same party respondents, (b) the holding of the Court of Appeals that an Illinois corporation whose charter had been revoked more than two years could not be adjudicated a bankrupt, because it no longer existed does not determine the status in bankruptcy of an unincorporated company conducted by the persons who were stockholders of the former entity, or some of them.

2. That on all the facts in the record the only fair conclusion is that the stockholders and officers of the old corporation after its demise operated in the manner and form of a corporation; that they conducted a business jointly after the pattern of a corporation, and under the authorities we have cited, this resulted in an unincorporated company, as well as an association, which was of the character that would come within the definition of a corporation as set out in the Bankruptcy Act.

3. The evidence shows a business conducted by a group of individuals operating for business purposes, avoiding or attempting to avoid individual liability and conducting the business with the hope of profit. Such

company is subject to the bankruptcy act as a corporation.

The judgment of the Circuit Court of Appeals for the Seventh Circuit is not in error, it is not in conflict with the decisions of any other circuit, it merely construed a statute in line with the construction that has been placed on that statute by the other courts before whom it has been in issue and in line with the decisions of this and other courts construing the same language appearing in other statutes. Hence the petition for certiorari ought to be denied.

Respectfully submitted,

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